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IN THE

Supreme Court of the United States

OCTOBER TERM 1949

No. 410

RYAN STEVEDORING COMPANY, INC.,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION

Petitioner prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit affirming a decree of the District Court for the Southern District of New York sustaining the exception of the United States to an impleading petition in an admiralty suit entitled Petterson Lighterage and Towing Corp., as managing owner of the derrick lighter Abbate, against Ryan Stevedoring Company, Inc., and Waterman Steamship Corporation, respondents; United States of America and E. I. Du Pont de Nemours and Company, Inc., respondents impleaded.

The decree of the Court of Appeals was entered on June 6, 1949 (R. 37); petitioner's application for a rehearing was filed on June 21, 1949 (R. 38), and was denied on July 22, 1949 (R. 42). Jurisdiction of this court is invoked under 28 U. S. Code §1254(1).

The District Court's opinion (R. 19) is reported in 1949 A.M.C. 753, and that of the Court of Appeals (R. 27) in 1949 A.M.C. 1363; 175 F. 2d 490.

Statement

On August 9, 1947, the managing owner of the lighter Abbate brought this suit against the petitioner and another to recover damages for injury done to the lighter by a fire that occurred on August 11, 1944, while the lighter was discharging her cargo of steel drums at Pier 4, Hoboken, where the petitioner was conducting stevedore operations. It was alleged among other things that the fire had been caused by the petitioner's negligence in allowing one of its chisel trucks to detonate some drums of high explosives on the pier, either by striking them or by creating sparks that caused them to explode (R. 3, 4).

On January 19, 1948, the petitioner impleaded the United States and another under the 56th Admiralty Rule, claiming a right of indemnity in respect of any liability that the petitioner might sustain to the libelant (R. 9).

In substance the petitioner alleged that at the time of the fire the petitioner was working at the pier under a contract with the United States and was engaged in handling a lot of metal drums marked "kolloxiline" that were owned by the United States and had been transported by it on a lighter to the pier, and in part placed upon the pier, for shipment to Russia on a steamship owned and operated by the United States and then lying at the pier, and that certain of the drums had been laden on the steamer (R. 11, 12). [The drums were in fact those described in the libel

as the cargo of the lighter Abbate, and were being discharged from the lighter for transit across the pier to the steamer but they were not so distinctly described in the impleading petition. There was no dispute on that point, however, and it was not material to the decision below, but in applying for a rehearing the petitioner unsuccessfully sought leave to clarify the matter by an amendment (R. 39, 40).]

It was alleged in the impleading petition that the drums in question contained nitrocellulose, but that they were not marked or labeled to give notice of their contents to the petitioner or its employees, and that the drums were not tight; also that the nitrocellulose contained in the drums had so deteriorated as to become unstable and unfit for ordinary handling, and that the United States, as owner and shipper of the cargo, was at fault for those conditions and moreover had failed to comply with the laws and regulations relating to the shipment of explosive or inflammable goods (R. 12-15).

The petitioner alleged that the fire started in or near those drums, the contents of which ignited or exploded, spreading the fire beyond control; that the resulting damage was not attributable to any active or affirmative negligence on the part of the petitioner, and that if the libelant should recover against the petitioner, the latter should be indemnified by the United States (R. 13-16).

The right of indemnity was alleged to be based on one or another of three statutes, the Suits in Admiralty Act (46 U. S. Code §741 et seq.), the Federal Tort Claims Act (28 U. S. Code §1346-b) or the Tucker Act. (The claim under the Tucker Act will not be pressed here.)

On the exception of the United States the impleading petition was dismissed (Clancy, *D.J.*, R. 19) and on appeal the dismissal was affirmed (Clark, *C. J.*, writing with the concurrence of Judges Chase and Dobie, R. 27).

The Decisions Below

Referring to the Suits in Admiralty Act, the district court held that liability thereunder arising from the government's ownership of cargo must be "directly connected with the government's ownership and operation of a vessel", and also that only claims for transportation charges on such cargo "could intelligently have been intended to be included" (R. 20).

The Court of Appeals disagreed with the latter observation, but affirmed the view that the liability of the government as a cargo owner must be "directly connected with the government's ownership and operation of a vessel" (R. 32).

In reaching that conclusion the Court of Appeals recognized that cargo may perhaps be regarded as "an active cause of harm", and also that the Suits in Admiralty Act created something more than a substitute for a proceeding in rem; but the court deemed its conclusion to be supported collaterally by the proviso in §742 "that such vessel is employed as a merchant vessel", and by the further provision in the same section as to the place of suit. On the last mentioned point the Court of Appeals cited a district court decision that the provision is jurisdictional, although this court's later decision in *Hoiness* v. *United States*, 335 U. S. 297, 302, would seem to indicate the contrary (R. 33).

Finally, the Court of Appeals mentioned, the Suits in Admiralty Act, as supplemented by the Public Vessels Act, does not admit the suggestion that the government's "immunity is to be waived in essentially every case which can be brought in the admiralty" (R. 33). In that respect, the court found the earlier acts to be incomparable to the Federal Tort Claims Act.

It had been suggested by the district court that the impleading petition might well state a case under the Federal Tort Claims Act if it were not outlawed by the express language of that statute (R. 19). The Court of Appeals agreed, in the following language (R. 35):

> "The Federal Tort Claims Act, enacted August 2, 1946, seems clearly inapplicable. It grants a remedy on 'any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government,' etc. 28 U. S. C. A. §931, now restated in §1346(b). Hence liability exists only for torts committed on or after January 1, 1945. *Niagara Fire Ins. Co.* v. *United States*, D. C. S. D. N. Y., 76 F. Supp. 850, 853, 854. Moreover, suit must be brought within one year after either the date of accrual of the claim or August 2, 1946, whichever is later, 28 U. S. C. A. §942, now §2401; *Sweet* v. *United States*, D. C. S. D. Cal., 71 F. Supp. 863. A later accruing claim for indemnity because of an earlier tort would seem not freed from that bar."

A similar problem was briefly considered by the Court of Appeals in discussing the question whether, if the Suits in Admiralty Act were applicable, the petitioner's right of

indemnity or contribution would be barred by the two-year limitation contained in Section 5 of that Act (46 U. S. Code §745). The court cited its decision in *Esso Standard Oil Co. v. United States*, 174 F. 2d 182, which will be referred to again later, as authority against the petitioner, but noted that this ground was not relied on by the district judge and was not necessary to the appellate court's decision (R. 35).

The Questions Presented

1. Under the Suits in Admiralty Act, is the liability of the United States as the owner of cargo confined to cases in which the asserted liability is "directly connected with the Government's ownership and operation of a vessel"?

2. Where a proceeding in admiralty would be maintainable against a private person in like circumstances, does the Suits in Admiralty Act authorize a libel against the United States upon the allegations that it was the owner of cargo which it transported by lighter to a pier for shipment on a steamer alongside, owned and operated by the United States, and that after some of the cargo had been so laden, but before all had been discharged from the lighter, the part intermediately on the pier ignited or exploded by reason of its dangerous and concealed unfitness for ordinary handling, for which condition the United States, as owner and shipper, was at fault?

3. If otherwise maintainable under the Suits in Admiralty Act, is the petitioner's claim for maritime-law indemnity or contribution barred by the provision of sec-

tion 5 (28 U. S. Code §745) that "suits hereunder shall be brought within two years after the cause of action arises"?

4. If the petitioner's claim for indemnity or contribution is not maintainable under the Suits in Admiralty Act, is the claim maintainable under the Federal Tort Claims Act, it appearing that the maritime tort occurred prior to January 1, 1945, but that the petitioner's claim for indemnity or contribution did not accrue until after that date?

Reasons for Granting Petition

It is manifest that the questions presented are of general importance to the administration of the Suits in Admiralty Act and the Federal Tort Claims Act.

With respect to the Suits in Admiralty Act, the Court of Appeals noted that it presents "interesting and novel problems as applied to the circumstances of this case", and added (R. 31):

> "It is perhaps strange that, although the remainder of this statute has been extensively litigated, there seems almost no litigation, and certainly no decision, dealing with the meaning of *cargo* in this connection. But we apprehend that it will be found as difficult as the remaining portions have already proved to be".

There is no question that the impleading petition is maintainable either under the Suits in Admiralty Act or under the Federal Tort Claims Act unless those Acts require the application of a special and unique rule for determining the time when a maritime cause of action for indem-

nity or contribution arises or accrues against the United States.

The proposition that a maritime claim for indemnity or contribution does not "arise" or "accrue" before the claimant has suffered loss, is amply sustained by decisions of this court and by those cited at R. 34.

In *Erie Railroad Co.* v. *Erie and Western Transportation Co.*, 204 U. S. 220, it was contended that a claim for indemnity or contribution by one shipowner against another in respect of what the former had been obligated to pay a third party was barred by the judgment in former litigation between the two shipowners involving their liability to each other for injury to their respective vessels. In rejecting that contention, Mr. Justice Holmes took pains to point out that the right to indemnity or contribution in respect of a subsequent liability to a third person was necessarily a separable right. Noting that the pleadings in the former suit did not open the claim for indemnity, he said at page 227:

> "They could not have done so, because at that stage the petitioner not having paid, it had no claim for indemnity, but only for exoneration. It was not bound to adopt the procedure permitted to it by Rule 59."

In *The Ira M. Hedges*, 218 U. S. 264, the same justice made the same point. He mentioned that although the libel in terms alleged a claim to recover the full amount for which the claimant had been held liable, nevertheless the pleading might be held as substantially claiming the right to recover either the whole of what the claimant had expended or contribution on account of such payment. It was

emphasized that the right to contribution in such a case belongs to the substantive law of the admiralty and is not a mere incident of a form of procedure.

In denying the application here of the established rule that a claim for indemnity accrues, for the purpose of limitation, only when the claimant has been subjected to liability, the Court of Appeals cited a recent decision of its own, in which, however, the proposition was rendered entirely moot by the disposition which the court made of that case on another ground, whereby the timeliness of the claim for contributions was fully sustained (*Esso Standard Oil Co.* v. *United States*, 174 F. 2d 182, at 186).

In *American Stevedores, Inc.* v. *Porello*, 330 U. S. 446, 453; it was noted that the several Acts of Congress herein referred to, of general application, have attested to the growing feeling of Congress that the United States should waive its sovereignty in tort cases.

Section 3 of the Suits in Admiralty Act provides that suits thereunder "shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties"; and the Tort Claims Act (28 U. S. Code §1346-b) provides for an action on a claim for money damages "accruing on and after January 1, 1945", for loss of property "under circumstances where the United States, if a private person, would be liable to the claimant * * * ".

In the light of those provisions there is no evident reason why a claim under either of those Acts should be treated as arising or accruing at any time different from the time when a claim of the same sort would be held to arise or accrue against a private party.

Conclusion

It is respectfully submitted that this case, involving the construction of two remedial statutes of the United States, each of wide application, both very narrowly interpreted with doubtful correctness by the courts below, abundantly warrants the attention of this honorable court.

JOHN C. CRAWLEY,
Counsel for Petitioner.

APPENDIX

Material provisions of the Suits in Admiralty Act, 46 U. S. Code.

"§741. Exemption of United States vessels and *cargoes* from arrest or seizure

No vessel owned by the United States or by any corporation in which the United States or its representative shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no **cargo** owned or possessed by the United States or by such corporation, shall, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: Provided, That this chapter shall not apply to the Panama Railroad Company."

"§742. Libel in personam

In cases where if such vessel were privately owned or operated, or if such **cargo** were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against any corporation mentioned in section 741 of this title, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or **cargo** charged with liability is found. * * * "

"§743. Procedure in cases of libel in personam

Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. * * * If the libelant so elects in his libel, the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit. * * * "

"§744. Release of privately owned vessel after seizure * * * ."

"§745. Causes of action for which suits may be brought; limitations; exceptions; actions which may not be revived; interest on claims

Suits * * * hereunder shall be brought within two years after the cause of action arises: * * * ."

Material provisions of Federal Tort Claims Act. 28 U. S. Code, as amended April 25, 1949.

Federal Tort Claims Act. 28 U. S. Code

"§1346. United States as defendant

* * *

(b) Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for

money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

"§2401 (b) A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later, • • • ."

"Chapter 171 Tort Claims Procedure

"§2680. Exceptions

The provisions of this chapter and section 1346 (b) of this title shall not apply to—

• • •

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States."